**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| Federal-State Joint Board | ) | CC Docket No. 96-45 |
| on Universal Service | ) | |
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To: Federal-State Joint Board on Universal Service

# DOBSON COMMENTS ON JOINT BOARD PROPOSALS FOR HIGH-COST UNIVERSAL SERVICE REFORM

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# SUMMARY

Dobson fully supports the proposals' recognition of the need for fundamental reform to the high-cost universal service system. Dobson also agrees with certain elements of some of the proposals. For example, as Dobson previously has argued, the Joint Board and the Commission should implement a transition to a single, unified, forward-looking mechanism to provide support for all qualified carriers. As Dobson previously has stated, a temporary, interim step during such a transition might include the calculation of support for wireless carriers based on a wireless cost model and the calculation of support for wireline carriers based on a wireline model. Dobson also supports the proposals' calls for the calculation of support based on companies' entire operations within a state, in order to recognize real economies of scale and scope that these carriers should be able to realize. Dobson also supports some proposals' calls for the elimination of distinctions among carriers, such as rural and non-rural carriers and incumbents and new entrants.

At the same time, none of the proposals would, as Dobson has urged in this proceeding, adequately account for the evolving way that rural consumers use telecommunications services. Moreover, none of the proposals maintains adequate federal authority over the federal universal service program. In addition, some of the proposals fail to ensure that universal service will be administered in a competitively neutral manner. In fact, some of the proposals blatantly discriminate against wireless ETCs, or would "regulate up," imposing needless monopoly-era regulations on competitive wireless carriers. The Joint Board should ensure that its recommendations are formulated with a forward-looking vision for providing "reasonably comparable" telecommunications services to consumers in rural America.

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To: Federal-State Joint Board on Universal Service

**DOBSON COMMENTS ON JOINT BOARD PROPOSALS FOR HIGH-COST UNIVERSAL SERVICE REFORM**

Dobson Cellular Systems, Inc. ("Dobson") hereby submits its comments in response to the Joint Board's *Public Notice* seeking comment on proposals for reform of the high-cost universal service mechanism.[1] Specifically, the *Public Notice* seeks comment on four proposals: The State Allocation Mechanism, A Universal Service Reform Package, proposed by Commissioner Ray Baum ("SAM Proposal"); Three Stage Package for Universal Service Reform, proposed by Joint Board member Billy Jack Gregg ("Three Stage Proposal"); A Holistically Integrated Package, proposed by Commissioner Robert Nelson ("Holistic Proposal"); and the Universal Service Endpoint Reform Plan, proposed by Joint Board State Staff Members Joel Shifman, Peter Bluhm and Jeff Pursley ("Endpoint Proposal").

[1] *Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission's Rules Relating to High-Cost Cost Universal Service Support*, CC Docket No. 96-45, *Public Notice*, FCC 05J-1 (rel. Aug. 17, 2005) ("*Public Notice*").

Dobson wholly supports the efforts made in these proposals to bring needed fundamental reform to the high-cost universal service system. At the same time, although Dobson applauds the proposals' willingness to consider bold reforms to some aspects of the program, none of the proposals would, as Dobson has urged in this proceeding, adequately account for the evolving way that rural consumers use telecommunications services. Moreover, none of the proposals maintains adequate federal authority over the federal universal service program. In addition, some of the proposals fail to ensure that universal service will be administered in a competitively neutral manner; in fact, some of the proposals blatantly discriminate against wireless ETCs.

## I. REFORM OF THE FCC'S HIGH-COST PROGRAM MUST INCLUDE A TRANSITION TO A SINGLE, UNIFIED FORWARD-LOOKING MECHANISM

Dobson supports a transition to a single, unified and simplified high-cost support mechanism that would replace the current separate embedded high-cost mechanisms.[2] Dobson also supports a transition for all recipients of high-cost support to a forward-looking mechanism based on the most efficient technology. The use of forward-looking costs will reward efficiency and provide the appropriate competitive entry signals.[3]

Three of the proposals in the *Public Notice* recognize the need to unify the current separate high-cost mechanisms into one mechanism. The Endpoint Proposal seeks to unify all existing universal service programs, including High Cost Loop Support, Local Switching

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[2] Comments of Dobson Cellular Systems, Inc. on Certain of the Commission's Rules Relating to High-Cost Universal Service Support, CC Docket No. 96-45, at 6-8 (filed Oct. 15, 2004) ("Dobson October 2004 Comments"); Reply Comments of Dobson Cellular Systems, Inc. on Certain of the Commission's Rules Relating to High-Costs Universal Service Support, CC Docket No. 96-45, at 5-8 (filed Dec. 14, 2004) ("Dobson December 2004 Reply Comments").

[3] Dobson October 2004 Comments at 6; Dobson December 2004 Reply Comments at 5-7.

Support, Safety Net Support, High Cost Model Support, Interstate Access Support, and Interstate Common Line Support, into one program.[4] The Holistic Proposal states that the Endpoint Proposal "makes a compelling case for … combining all existing high cost support (loop, switching, safety net, etc.) into one program."[5] Additionally, the Three Stage Proposal, which would permit rural carriers serving less than 100,000 lines to remain on the embedded cost model through stage two of its plan, proposes to modify the three separate rural support mechanisms into one mechanism that would include reimbursement for transport costs.[6] Eventually, in the third stage of the Three Stage Proposal, all carriers, regardless of status, would be transitioned to a single, unified high-cost system.[7] Dobson certainly supports these proposals' efforts to simplify the universal service system by transitioning to one unified mechanism.

In addition, two of the proposals consider transitioning to a forward-looking mechanism.[8] As Dobson has noted previously, the Joint Board should recommend a transition to a forward-

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[4] *Public Notice*, App. D, at 21, 23. The unified approach would include transitioning to an omni-jurisdictional mechanism that would provide support for both interstate and intrastate costs.

[5] *Id.*, App. C, at 17.

[6] *Id.*, App. B, at 10.

[7] *Id.*, App. B, at 12.

[8] The Three Stage Proposal recommends transferring some larger carriers to the forward-looking mechanism, while the SAM Proposal only considers use of the forward-looking mechanism. Specifically, the Three Stage Proposal calls for all rural carries serving 100,000 or more lines to be transitioned to Commission's forward-looking high-cost model. This proposal states that use of the forward-looking "model for larger carriers should reduce the total amount of high cost support and eliminate problems with determining per line support for individual wire centers." *Id.*, App. B, at 8-9. Although this proposal does not explicitly state that all carriers would be transitioned to the forward-looking mechanism, it does state that in stage three, all carriers would be transitioned to a unified high-cost system. The SAM proposal, on the other hand, debates the merits of allocating federal universal service funds to states based on the
(continued on next page)

looking model to establish the cost basis of support for all carriers that receive high-cost support.[9] A forward-looking model eliminates the incentives for inefficiency and gold-plating resulting from basing support on the incumbent's embedded costs and ends the debate raised by providing support to CETCs based on incumbents' costs.

Dobson notes that the SAM Proposal, in particular, would allocate support based on modeled costs, using the most efficient technology. Noting criticisms of the accuracy of forward-looking models, the SAM Proposal rightly observes that "embedded costs, either based on a model or the actual embedded costs of each carrier, also involve error, i.e., they can overstate or understate the actual need for universal service support in particular cases."[10] Dobson believes that a transition to a forward-looking model will lead to more accurate determinations of appropriate support amounts. As Dobson has noted in previous comments, from the release of the *First Universal Service Report and Order* in 1997, the Commission always has had the intention of using a forward-looking cost model to determine rural carriers' support.[11] At that time, the Commission stated that a forward-looking model "should be able to predict rural carriers' forward-looking economic cost with sufficient accuracy that carriers serving rural areas could continue to make infrastructure improvements and charge affordable

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results of either an embedded or forward-looking cost model, using the most efficient technology.

[9] Dobson October 2004 Comments at 6-8; Dobson December 2004 Reply Comments at 5-8.

[10] *Public Notice*, App. A, at 4.

[11] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997) ("*First Universal Service Report and Order*").

rates."[12] Moreover, the Commission noted the benefits that the use of a forward-looking mechanism would bring to rural areas, stating that "incorporating forward-looking economic cost principles would promote competition in rural study areas by providing more accurate investment signals to potential competitors."[13] Certainly by 2005 rural carriers must begin accepting the reality of competition, already years in the making, and the need for related adjustments to the universal service program. Even in 1997, the Commission recognized the value of forward-looking cost methodologies to the developing competition in the telecommunications industry:

> [W]e find that, rather than causing rural economies to decline, as some commenters contend, the use of such a forward-looking economic cost methodology could bring greater economic opportunities to rural areas by encouraging competitive entry and the provision of new services as well as supporting the provision of designated services. Because support will be calculated and then distributed in predictable and consistent amounts, such a forward-looking economic cost methodology would compel carriers to be more disciplined in planning their investment decisions.[14]

Moreover, the Commission has long recognized the failure of the embedded cost mechanism and, therefore, the inefficiencies associated with the continued use of the model. In its *First Universal Service Report and Order*, the Commission rejected arguments for basing non-rural support on embedded costs, and concurred with the Joint Board that "embedded cost[s] provide the wrong signals to potential entrants and existing carriers. … and support of embedded

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[12] *Id.* at 8935.

[13] *Id.* at 8936.

[14] *Id.* at 8936 (citations omitted).

costs would direct carriers to make inefficient investments that may not be financially viable when there is competitive entry …"[15]

For these reasons, in a later decision the Commission determined that use of the embedded mechanism for rural carriers was probably not sustainable indefinitely.[16] More recently, the Commission has stated when deciding whether or not to keep separate mechanisms for rural and non-rural carriers, "the Joint Board should consider both the benefits of maintaining distinct support mechanisms for rural and non-rural carriers and the extent to which this creates administrative burdens, incentives for arbitrage, or other inefficiencies."[17]

Although the Commission has not yet tried to create a forward-looking model for rural or wireless carriers, Dobson is confident the effort can be successful. As both the Rural Task Force

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[15] *Id.* at 8899.

[16] *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, 16 FCC Rcd 11244, 11311 (2001) ("*Fourteenth Universal Service Order*") (noting that the Commission agreed at the time with the Rural Task Force that a distinct rural mechanism was appropriate, but believed "that there may be significant problems inherent in indefinitely maintaining separate mechanisms based on a different economic principles"); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Order*, 19 FCC Rcd 11538, 11541 (2004) (citing *Fourteenth Universal Service Order*, 16 FCC Rcd at 11310) ("The Commission further indicated that, although it believed that distinct rural and non-rural mechanisms were appropriate at that time, two distinct mechanisms might not be viable in the long term.").

[17] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Order*, 19 FCC Rcd 11538, 11542 (2004).

and the Commission have recognized in the past, issues inherent in applying the non-rural mechanism to rural carriers can be addressed.[18]

The Joint Board therefore should recommend to the Commission the development, without further delay, of a forward-looking cost mechanism for areas served by rural carriers. As Dobson previously has explained, it may be necessary, as an interim step, to formulate separate rural wireline and wireless models, and calculate support for each type of carrier based on its own model during an interim period. In the long run, however, the Commission cannot balance its obligations to assure universal service support and responsibly steward a sustainable fund without determining universal service costs based on the most efficient technology. The interests of competition and of sending appropriate entry signals, as well as the interests of efficiency and sustainability of the universal service fund require such a transition.[19] There is simply no legal or policy reason for the Joint Board to recommend continued use of the less efficient approach.

In formulating a competitively neutral method for distributing high-cost support in rural areas, the Joint Board and the Commission should focus on population density as a proxy for, or indicator of, cost of service. Regardless of the technology deployed, the cost of providing service – and thus the support required – is higher in less dense areas. If the Joint Board is

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[18] *Fourteenth Universal Service Order*, 16 FCC Rcd at 11312 (stating that if inputs based on rural carrier data had been used in the non-rural forward-looking mechanism, the differences between the results of using the mechanism and actual company data could have been eliminated).

[19] As such, there is simply no justification to the Endpoint Proposal's approach of determining all costs, for all carriers (including price cap carriers) based on embedded or "accounting cost." *Public Notice*, App. D, at 20. This proposal, however, does recommend using cost outputs of the forward-looking model or "best in class" standards as incentives to eliminate wasteful spending. *Id.*, App. D, at 21.

uncomfortable, for example, recommending the distribution of support based directly on the cost computations of a forward-looking cost model, the Joint Board could recommend that the Commission identify areas where population drops below a particular density, necessitating federal support. The geographic area considered should be a competitively neutral area, such as a county or Census Block Group rather than an area connected to any particular technology (such as an incumbent wire center).

## II. DOBSON SUPPORTS PROPOSALS TO CALCULATE COSTS ON A STATEWIDE BASIS.

All of the proposals before the Joint Board call for support to be calculated on a statewide basis or for the consolidation of companies' study areas in a single state for purposes of calculating support. Specifically, the SAM Proposal recommends that the model the Commission adopts should be applied on a statewide basis. Dobson agrees with this proposal's conclusion that errors regarding use of a model "will tend to cancel out across the wire centers in each State."[20] Similarly, the Endpoint Proposal argues that the Commission should implement a plan that would calculate support based on the aggregated cost characteristics of all incumbent carriers in the state, with support provided to states with high average costs. The authors of this proposal acknowledge that their plan is similar to the averaging policy currently used for non-rural carriers.[21] Although, as explained in the preceding section, support should not be determined based on incumbents' cost structure, Dobson supports the Endpoint Proposal's concept of determining carriers' needs for support at the state level.

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[20] *Id.*, App. A, at 4.

[21] *Id.*, App. D, at 21-22.

The Three Stage Proposal and the Holistic Proposal advocate combining all of the study areas within a state owned by a single company into one study area.[22] Dobson agrees with the Three Stage Proposal that "[c]ombination of study areas within a state under common ownership would result in recognition of efficiencies of scale and scope actually enjoyed by each carrier."[23] Moreover, Dobson agrees with the benefits noted by the authors of the Holistic Proposal, who argue that statewide averaging of costs will provide "incentive[s] for investment in rural facilities."[24]

Publicly available data regarding some of the ILECs that currently qualify for "rural" treatment reveals the importance of this type of reform. For example, CenturyTel's website touts the company as the "8th largest local exchange company in the United States based on access lines," serving over 2 million lines in 26 states, as well as over 1 million long distance customers and almost 200,000 DSL customers.[25] Similarly, TDS boasts of over 1 million access lines and over 3,300 employees.[26]

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[22] *Id.*, App. B, at 8-9; *id.*, App. C, at 17.

[23] *Id.*, App. B, at 9. This proposal also notes that consolidation of study areas at the state level will ensure that local switching support goes only to truly small carriers that cannot obtain the necessary scale and scope efficiencies. Additionally, the proposal states that combining study areas will remove a barrier to the sale of rural exchanges by permitting recovery of costs associated with that acquisition. Dobson agrees that these are benefits that should be taken into consideration by the Joint Board when considering why carriers should be required to combine their study areas at the state level.

[24] *Id.*, App. C, at 17.

[25] *See* http://www.centurytel.com/about/companyProfile/companyStatistics.cfm (visited Sept. 28, 2005).

[26] *See* http://www.tdstelecom.com/about/mediakit.asp (visited Sept. 28, 2005).

As all four proposals have recognized, calculating support on a statewide basis or combining the study areas of company in each state will implement necessary universal service reform that will reduce error, take into account economies and scale and scope and provide incentives for investment. As such, the Joint Board should recommend that the Commission make such changes to its universal service mechanism.

## III. THE COMMISSION SHOULD ELIMINATE DISTINCTIONS BETWEEN RURAL AND NON-RURAL CARRIERS AND INCUMBENTS AND NEW ENTRANTS

Dobson supports the efforts in some of the proposals to eliminate the distinctions between rural and non-rural carriers and incumbents and new entrants. Such changes would lead to more competitively neutral and non-discriminatory policies. The Three Stage Proposal states it most clearly: "Differences in treatment between rural and non-rural carriers, between incumbents and new entrants, and between technologies should be eliminated."[27] The Holistic Proposal also states that the distinction between a rural and non-rural carrier will become moot "because all carriers serving rural areas would be eligible for support."[28] Finally, the SAM Proposal recommends the determination of support based on costs for the most efficient technology, which has the effect of eliminating the distinction between rural and non-rural carriers and incumbents and new entrants.[29]

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[27] *Public Notice*, App. B, at 12.

[28] *Id.*, App. C, at 16.

[29] *Id.*, App. A, at 3.

Dobson has noted its support in the past for narrowing the definition of a rural carrier while the FCC transitions to a single, forward-looking mechanism.[30] Once the transition to this unified single mechanism is complete, Dobson supports the complete elimination of the distinction between rural and non-rural carriers, as do some of the proposals before the Joint Board.

As noted above, Commission precedent supports elimination of the distinction between rural and non-rural carriers regarding the mechanism used. Moreover, in a separate proceeding, the Commission has stated that, although some provisions of the Telecommunications Act specifically recognize that incumbent LECs and new entrants are not equivalent, nevertheless, "[w]hen robust competition is widespread we should do everything possible to eliminate anomalies or asymmetries between the rules applicable to incumbents and the rules applicable to new entrants."[31] In addition, although the Act distinguishes between rural and non-rural carriers in the designation of competitive ETCs, it does not distinguish with respect to the provision of high-cost support.[32] Because competition in rural areas is on the rise, as can be seen from the continued growth in the number of CMRS carriers providing service in rural areas, there is no longer any reason for maintaining a distinction between incumbents and new entrants.

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[30] Dobson October 2004 Comments at 4-6; Dobson December 2004 Reply Comments at 2-4 (arguing that as interim step, the Joint Board should recommend that rural carriers "should be identified based on population density as measured over a geographic area with clearly defined boundaries," such as thresholds of 100 persons-per-square mile or those areas lying outside of the U.S. Census Bureau's "urbanized areas").

[31] *Southwestern Bell Telephone Company, Tariff F.C.C. No. 73*, CC Docket No. 97-158, *Order Concluding Investigation and Denying Application for Review*, 12 FCC Rcd 19311, 19337 (1997).

[32] *See* 47 U.S.C. § 214(e); 47 U.S.C. § 254(b)(3), (e).

## IV. NO PLAN CONTAINS SUFFICIENT SAFEGUARDS TO ENSURE COMPETITIVE NEUTRALITY IN THE DISTRIBUTION OF SUPPORT

All the proposals before the Joint Board contain some recommendation to allocate high-cost support to the states, such as through block grants, and allowing the state to allocate federal high-cost universal service support. These proposals, in every case, would leave the Commission too little discretion to determine the distribution of *federal* high-cost support, and insufficient means to ensure that the substantial responsibilities that the Act places upon the Commission are fulfilled.[33]

The Commission has a duty under Section 254(e) to ensure that support is "*explicit* and *sufficient* to achieve the purposes" of section 254.[34] That same section further requires that carriers that receive federal universal service support "use that support *only* for the provision,

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[33] The SAM Proposal provides for allocations of federal universal service high-cost support and Lifeline/Linkup funds to accounts for each state. Each state would determine the distribution of its allocation to ETCs in its state and make adjustments to each ETC's allocation on a case-by-case analysis. *Public Notice*, App. A, at 3-4. The Three Stage Proposal recommends a block grant system similar to that proposed in the SAM Proposal, with states having the responsibility for distributing funds to the ETCs. This plan specifically states that "difficult decisions on allocating funds to different carriers and areas within each state" would be handled by the state commission. *Id.*, App. B, at 12. The Holistic Proposal also recommends block grants to the states. Although this proposal would be administered pursuant to FCC guidelines and with FCC oversight, the proposal also notes that states would be given more discretion, including how many carriers are funded in rural areas and the level of funding received by each carrier. The proposal argues that states are in a better position to ensure that USF funds are distributed to where they are needed because they are close to the customers and can provide day-to-day oversight that is necessary to monitor potential abuse. *Id.*, App. C, at 15-16. The Endpoint Plan delegates the most authority to the states. Except for a few limitations, states would have complete discretion regarding the distribution of funds to carriers, including assigning support only to certain carriers or in certain study areas. Also, the states would be permitted to place conditions on the receipt of support in particular uses, such as requiring the carrier to meet broadband deployment targets in particular exchanges. *Id.*, App. D, at 24-25.

[34] 47 U.S.C. § 254(e) (emphasis added).

maintenance, and upgrading of facilities and services for which the support is intended."[35] Section 254(b)(3) also requires that the Joint Board and the Commission base "policies for the *preservation and advancement* of universal service" on the principles that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, … that are *reasonably comparable* to those services provided in urban areas and that are available at rates that are *reasonably comparable* to rates charged for similar services in urban areas."[36]

The "block-granting" approach embodied in all of the proposals in the *Public Notice* would leave the Commission with an insufficient role to ensure that these statutory responsibilities are met. Further, these statutory duties imposed by Congress cannot be subdelegated to the states unless the statute specifically allows for it. The D.C. Circuit in the *USTA II* case stated that "federal agency officials … may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so."[37] The court determined that state commissions were considered to be "outside entities" and therefore could not be delegated to unless specific provisions existed permitting such delegation.[38] In terms of the Communications Act, which includes provisions that permit subdelegation to state commissions, the court found that in order for subdelegation to a state commission to be permitted under the

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[35] *Id.* at § 254(e) (emphasis added).

[36] *Id.* at § 254(b)(3) (emphasis added).

[37] *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) *("USTA II")*.

[38] *Id.*

Act, the statute had to "delineate a particular role for the state commissions."[39] No part of Section 254 gives the FCC authority to delegate to the states its duties to ensure that universal service is explicit and sufficient, that support is being used for its intended purposes, or that reasonably comparable services are being provided to rural consumers.[40]

Indeed, the structure of the statute reveals that Congress contemplated *separation* of federal and state jurisdiction over implementation and administration of universal service programs. Section 254(f) preserves the states' authority to adopt *state* universal service mechanisms, but limits that authority to mechanisms that are "not inconsistent with the Commission's rules" and "do not rely on or burden Federal universal service support mechanisms."[41] This statutory separation between state and federal roles makes it difficult to justify state control over how and how much federal USF is distributed to ETCs.

A block-granting approach also would be bad policy because of the states' historical lack of experience with policies relevant to carriers other than LECs. Since Section 332(c) limited the states' ability to regulate wireless carriers' rates and entry over a decade ago, the states lack in-depth knowledge of wireless networks, the standards that govern them and their operations. As a result, states lack the necessary experience to implement competitively neutral policies that ensure comparability of *services* and *technologies*. Because of the FCC's experience in

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[39] *Id.* at 568.

[40] *See* 47 U.S.C. § 254. Although Section 254(f) permits a state to adopt state USF programs, it does not permit subdelegation of the Commission's authority found in Section 254. Congress clearly knew how to provide for such a subdelegation when it wished to do so. *See, e.g.,* 47 U.S.C. § 251(e)(1) (specifically permitting the FCC to delegate numbering authority to the states).

[41] 47 U.S.C. § 254(f).

regulating all technologies, it is in the best position to adopt and enforce policies of reasonably comparability and competitive neutrality.

The concern that some state commissions may not treat wireless ETCs fairly, if given greater authority over the distribution of high-cost support, is not merely theoretical. State decisions regarding the designation of competitive ETCs, and wireless ETCs in particular, reveals a range of approaches, some of which stand in stark tension with the federal statute's vision for competitive and technological neutrality. For example, in Arkansas, the legislature passed a law requiring that the one and only ETC in certain rural telephone company study areas must be the incumbent LEC. The law provided that "[f]or the entire area served by a rural telephone company, excluding tier one companies, for purposes of the [state fund] and the federal Universal Service Fund, there shall be only one (1) eligible telecommunications carrier which shall be the incumbent local exchange carrier that is a rural telephone company."[42] This law has undermined the provision of comparable services to rural consumers in much of the state, and frustrated Congress's goal of universal service competition in all areas of the nation.

In Nebraska, the Nebraska Public Service Commission ("NPSC") initially designated a wireless carrier as an ETC in 2000, holding that the purpose of the public interest standard in section 214(e) was "not meant as a protective barrier for rural telephone companies but rather as a method for ensuring that rural areas receive the same benefits from competition as their urban neighbors.."[43] A short time later, however, the NPSC changed its policy decision and denied the

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[42] Ark. Code Ann. § 23-17-405(d).

[43] *Application of GCC License Corp. seeking Designation as an Eligible Telecommunications Carrier*, Application No. C-1889, *Order Granting ETC Status and Issuing Findings,* p. 7 (Nov. 21, 2000), *aff'd, Application No. C-1889 of GCC License Corporation,* 647 N.W.2d 45 (Neb. PSC 2002).

application of the next carrier to apply.[44] The NPSC determined that universal service should *not* be a vehicle for competition, that wireless carriers should not be ETCs given how the Commission regulates wireless services, and that no federal subsidies would be "necessary" to bring wireless service offerings to rural areas.[45] These determinations, which were contrary to policy decisions made by the FCC, have had an adverse effect on universal service in Nebraska.

In Colorado and Arizona, the state commissions have used wireless ETC proceedings to "regulate up" – conditioning competitive carriers' participation in federal universal service programs on compliance with state LEC service regulations imposed on monopoly carriers. The Colorado Public Utilities Commission ("CPUC") issued an order conditioning a wireless carrier's ETC designation on a set of service criteria that included 1) review and approval of rates charged, and 2) operation pursuant to service quality standards "approximately the same" as those that apply to regulated LECs.[46] In Arizona, the Arizona Corporation Commission ("ACC") designated a wireless carrier as an ETC, but required the carrier to comply with a state statute regarding the filing and amendment of tariffs, and ACC rules regarding establishment of service, billing and collection, and termination of service.[47] These state decisions are directly counter to the Commission's guidance that wireless ETCs should not be subject to LEC

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[44] *In the Matter of the Amended Application of NPCR, Inc., d/b/a Nextel Partners, Eden Prairie, Minnesota, Seeking Designation as an Eligible Telecommunications Carrier That May Receive Universal Service Support*, Application No. C-2932, Denied (Neb. PSC Feb. 10, 2004).

[45] *Id.* at 8-9.

[46] *In the Matter of the Application of Western Wireless Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier*, Docket No. 03A-061T, Decision Granting Application Subject to Conditions, Decision No. C04-0545, at 51 (Col. PUC May 26, 2004).

[47] *In the Matter of the Application of Alltel Communications, Inc.*, Docket No. T-03887A-03-0316, Opinion and Order, Decision No. 67403, at 23 (Ariz. Corp. Comm'n Nov. 2, 2004).

regulation,[48] that the wireless industry is better regulated by competitive forces than by prescriptive regulation,[49] and that the wireless industry should be regulated on a national basis to avoid balkanized state-by-state regulation.[50]

These few examples reveal that some state commissions have used the universal service authority granted to them (in these cases, in the ETC designation context) to effectively rewrite federal policy regarding comparability of services available to rural consumers, competition in the provision of service, and the regulatory approach to competitive industries. This has been true even in cases where federal directives are abundantly clear. As a result, even where universal service funding has been made available to wireless carriers' to assure rural consumers' access to services that are comparable to service available in urban areas, funding often has been accompanied by expensive state regulatory obligations that have taken resources away from the provision of service and undermined federal regulatory policies. Moreover, wireless carriers have spent years in state commission dockets seeking to have state commissions do nothing more than follow federal law. The Commission should not establish a funding

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[48] *First Universal Service Report and Order*, 12 FCC Rcd at 8855-57.

[49] *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04-208, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448, 6466 (2005) ("The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers.") (citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, *Ninth Report*, 19 FCC Rcd 20597, 20601 (2004)).

[50] *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, PR Docket No. 94-106, *Report and Order*, 10 FCC Rcd 7025, 7034 (1995), *aff'd sub nom. Conn. Dept. of Pub. Util. Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

mechanism that would subject the distribution process to the kind of state proceedings that have created delay and inconsistency in designation proceedings.

The courts specifically have found that the Commission's obligation to ensure the comparability of service in rural areas has a technological component. The Tenth Circuit recently found that the Commission's definition of "reasonably comparable" did not adequately take into consideration the *advancement* of universal service.[51] As noted above, Section 254(b)(3)'s requirement for reasonably comparable services requires that the Joint Board and the Commission consider "policies for the *preservation and advancement* of universal service."[52] According to the Tenth Circuit, the idea of universal service as "applied to 'advance' or 'advancement' refers to evolving rules recognizing changes in markets and technology."[53] As such, not only is the FCC itself required to make and enforce policies allowing for reasonably comparability, the FCC also must take into consideration changes in markets and technology. Because of the widespread deployment of wireless service throughout the nation, and particularly in urban areas, the Commission simply cannot ignore its duty to ensure that rural consumers have access to wireless services that are reasonably comparable in capability and price to those services available to urban consumers.

The Commission also is required by its own rules to adopt universal service policies that are competitively neutral. In the Commission's *First Universal Service Report and Order*, it adopted a recommendation from the Joint Board that required competitive neutrality in the

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[51] *Qwest Comm. International, Inc. v. FCC*, 398 F.3d 1222, 1235-37 (10th Cir. 2005).

[52] 47 U.S.C. § 254(b)(3) (emphasis added).

[53] *Qwest*, 398 F.3d at 1236.

provision of universal service funding, finding that "competitive neutrality means that universal service support mechanisms and rules that neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[54]

Based on statutory requirements, the fundamental goals of preserving competitive neutrality and the potential for disparate treatment of wireless carriers at the state level, the Joint Board should recommend to the Commission that block granting can only be considered if it is constrained by strict federal guidelines to ensure non-discriminatory, competitively neutral distribution of support, including to competitive ETCs. All the plans acknowledge the need for some FCC oversight, but none sufficiently.[55] If states implement their own state funds, however, they of course retain discretion to determine how funds are distributed.

## V. THE COMMISSION SHOULD NOT ADOPT ANY PLAN THAT IS ILEC-CENTRIC AND EXPLICITLY DISCRIMINATES AGAINST WIRELESS ETCS

The Joint Board should reject recommendations in the four proposals before it that would discriminate against wireless carriers or would force wireless carriers to abide by monopoly-era ILEC regulations that are neither applicable nor needed in the wireless context. For example, despite the Communication Act's clear mandate that competitive ETCs – not just incumbent LECs – are to have the opportunity to receive universal service funding,[56] the Endpoint Proposal

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[54] *First Universal Service Report and Order*, 12 FCC Rcd at 8801, 8969.

[55] The Holistic Proposal seems to recommend the greatest amount of FCC oversight, stating that "the FCC's guidelines would address both how to determine what each state receives for the [state allocation mechanism], and, in general, how each state would allocate its distribution within the state." *Public Notice*, App. C, at 15. However, as noted above, this proposal also would allow the states to determine, for example, that only one carrier can be funded in a rural area.

[56] 47 U.S.C. § 214(e)(1)-(2).

makes recommendations that dramatically discriminate against wireless carriers seeking universal service funds. Specifically, the proposal calls for wireless ETCs to be funded not under the universal service regime applicable to other carriers, but under a new "Portability Fund."[57] The authors of the proposal state that the goal of the Portability Fund would be to "substantially improve wireless coverage in unserved areas, with a particular emphasis on unserved areas with major roads."[58] The fund would be capped at $1 billion per year, although the authors of the proposal admit that its proposed cap on the Portability Fund of $1 billion per year is substantially less than the $1.8 billion that the wireless industry currently contributes to universal service. Also, the proposal states that the Portability Fund would extend for five years and then would sunset, with the Joint Board determining whether the program should continue after the sunset date. The funds for the Portability Fund would be allocated to the states, with the states determining which wireless carriers receive the funding based on competitive grants. CMRS carriers would be required to apply for the grants, noting their intention to provide additional coverage in unserved areas and unserved roads, and then demonstrate later that the funds had been properly expended.

The premise behind the Endpoint Proposal's blatant discrimination against wireless carriers is that wireless and wireline networks have different cost characteristics and that customers do not view wireless as a true substitute to wireline service. As such, the proposal

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[57] *Public Notice*, App. D, at 26-27.

[58] *Id.*, App. D, at 27.

ultimately concludes that "support [to wireless carriers] is unlikely to have an effect on the affordability or comparability of wireless rates."[59]

The list of problems with the Endpoint Proposal's recommended Portability Fund is lengthy. The most obvious flaw with the recommendation is its clear contravention of Congress's goals in the Communications Act. As noted, Section 214(e) clearly contemplates that competitive ETCs – including wireless carriers – would have access to universal service equally with incumbents. Moreover, in clear contravention of Section 254(b) of the Act, the Portability Fund would provide incentives for building out to underserved areas, but is not meant to "preserve and advance" universal service or provide for reasonably comparable rates and services. Also, wireless carriers would only be provided funding for the construction of new facilities, even though Section 254(e) requires that ETCs receive support for "the provision, maintenance, and upgrading of facilities and services."[60]

Beyond the obvious statutory problems, the proposal's recommendations also contravene both the Joint Board's and the Commission's efforts to provide for competitive neutrality. Limiting wireless carriers' access to participation in the high-cost program while the incumbents are full-fledged ETCs with all the benefits such status conveys would be both discriminatory and not competitively neutral. The discrimination is exacerbated, however, by the Endpoint Proposal's recommendation that wireline competitive ETCs continue to have their support based on the ILEC costs.[61] Finally, what the authors of the plan do not take into account is the

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[59] *Id.*, App. D, at 26.

[60] 47 U.S.C. § 254(e).

[61] *Public Notice*, App. D., at 27.

problems they are trying to fix – funding one type of carrier based on another type of carrier's costs – could be solved with one step: transition to a single, unified, forward-looking cost model. When a real solution is available, the Joint Board should not accept a proposal that both contravenes the statute and is blatantly discriminatory.

Other proposals also recommend discriminatory treatment. The Three Stage Proposal, for example, recommends that support for ETCs be based on each ETC's own costs. Dobson has adamantly opposed such an approach in the past because wireless carriers operating in a competitive market should not be required to submit their costs to regulators like rate-regulated monopolists. Further, the burdens of such an approach can be – and therefore should be – avoided by transitioning to a single, unified, forward-looking mechanism based on the most efficient technology. As noted above, however, Dobson is receptive to the idea of determining wireless carriers' costs based on a cost model, and even using separate wireless and wireline models during an interim period, until the adoption of a unified model based on the least-cost technology.

## VI. CONCLUSION

The proposals in the *Public Notice* are to be commended for recognizing the need for comprehensive reform of the Commission's high-cost support mechanisms. True reform of high-cost support, however, must focus on rural consumers, and the evolving way that they use telecommunications services. Only by providing support in a competitively neutral way, based upon the cost of least-cost technology, can the Commission achieve the goals of universal service for the long term. Dobson urges the Joint Board to make recommendations to the Commission consistent with Dobson's comments in this proceeding.

Respectfully submitted,

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